IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.777 OF 2004

Vastimal Shivdasji Osawal
since deceased
Kiran Vastimal Oswal and ors. .. Petitioners
Vs
Vasant Vishnu Mondkar and Anr. .. Respondents.
Mr Vijay Patil, for the petitioners.
Respondent nos 1 and 2, though served,
remained absent.

CORAM : D.B.BHOSALE, J.
DATE : MAY 02, 2005.

P.C.

1. Heard the learned counsel for the petitioners. Respondent nos 1 and 2, though served, remained absent.

2. Rule. Returnable forthwith. Rule is heard finally.

3. This petition is directed against the order dated 29.1.2002 passed below Exhibit-1 in Civil Misc.Application No. 31 of 1998, dismissing the said application filed by the petitioners seeking condonation of delay of 125 days in filing the application for restoration of Spl. Civil Suit No.16 of 1995. The Spl.Civil suit was filed for declaration and recovery of money. The suit was dismissed for default on 23.2.1998 by the Jt.Civil

Judge, Sr,Dn.,Sindhudurg-Oras. The case set up by the petitioners seeking condonation of delay was that they were required to go to Bombay and Bangalore for business purpose. In so far petitioner no.4 is concerned, he resides at Bangalore. In view thereof, they had given power of attorney in favour of Vidhyadhar Shenai-Lanjekar to look after and conduct the special civil suit filed by them. According to the petitioners, at the relevant time, their power of attorney was suffering from some illness for which he had to go to Bombay and as a result of which nobody attended the suit and it came to be dismissed for default on 23.2.1998. According to the petitioners, when they came to know about dismissal of the suit for default, they filed Civil Misc.Application No.31 of 1998 for restoration of the suit and Exhibit-1 Application for condonation of delay in filing the application for restoration of the suit. The application came to be rejected by the trial Court mainly on the ground that no documentary evidence was produced on record in support of the illness of the power of attorney, who was attending the suit. In short, it was held that the petitioners failed to prove that their power of attorney was suffering from illness for which he had to go to Bombay which ultimately resulted in dismissal of the suit. I

perused the impugned order and the documents placed before me.

4. In my opinion, even if it is assumed that the reasons given in the application for condonation of delay by the petitioners were not entirely correct, considering the petitioners' interest in the property and the delay was only of 125 days and considering the law laid down by the Apex Court in relation to the approach of the Court while dealing with the application for condonation of delay, the Court below was not justified in rejecting the application filed by the petitioners. It is now well settled that refusing to condone delay can result in meritorious matter being thrown out at the very threshold and the cause of justice being defeated. Looking to the nature of the dispute and the reliefs claimed in the suit, it cannot be said that the delay in the instant proceeding was occasioned deliberately. The petitioners would not stand to benefit by resorting to delay. In the circumstances, I am inclined to allow this writ petition with cost.

5. The petitioners were directed to deposit Rs.5000/- vide order dated 18.11.2002 passed in Civil Revision Application No.1914 of 2002. In that civil

revision application, the very order which is impugned in the present writ petition was challenged by the petitioners. However, the said civil revision application was disposed of as not maintainable vide order dated 18.12.2002. According to Mr Patil, learned counsel for the petitioners, the petitioners were directed to deposit that amount in the civil revision application by way of cost to be paid to the respondents for allowing the said civil revision application. Considering that, Mr Patil, learned counsel for the respondents, fairly stated that the petitioners are prepared to pay cost of Rs.5000/- to the respondents. In the circumstances, the petitioners are allowed to withdraw the said amount of Rs.5000/- deposited in terms of the order passed by this Court on 18.11.2002.

6. In the result, this petition is allowed with cost of Rs.5000/- to be paid by the petitioners to the respondents within a period of 12 weeks from the date of receipt of this order. The Special Civil Suit No. 16 of 1995 stands restored to file. The trial Court, on the petitioners' complying with this order, shall proceed with hearing of the suit in accordance with law. Rule is accordingly disposed of.

(D.B.Bhosale, J.)

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